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No. 06-475

IN THE

Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERATED MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,

Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF LAW PROFESSORS MYRIAM GILLES AND GUY CHARLES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 4, 2006

MOTION OF PROFESSORS MYRIAM GILLES AND GUY CHARLES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Professors Myriam Gilles and Guy Charles move, pursuant to Supreme Court Rule 37, for leave to file the annexed Brief as *amici curiae* in support of the petition for a writ of certiorari. The Petitioners have consented. Hardy Vieux, of Robins, Kaplan, Miller & Ciresi L.L.P., counsel for Petitioners, contacted Respondents on behalf of *amici*, and sought but did not receive consent. Professors Gilles and Charles are therefore filing this motion.

The issue presented by the petition—whether a per se rule of excusable neglect should be applied to foreclose Petitioners' ability to opt out of the proposed class settlement—has broad implications beyond the important constitutional due process and litigant autonomy points raised by Petitioners writ. In particular, the right to opt out of class actions and class settlements serves the critical objective of deterrence. Because the *amici* believe their views would materially assist the Court in its consideration of the petition for a writ of certiorari, they respectfully request leave to file the attached brief.

Dated: December 4, 2006

Respectfully submitted,

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TABLE OF CONTENTS

QUESTION PRESENTED 1

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. Traditional Justifications Underlying the Opt-Out Right 2

1. Deterrence-Based Rationale for Maximizing Opt-Out Rights 5

2. Collusive Settlements 6

3. Infrequency of Opt-Outs 8

4. Evidence that Opt-Outs Do Better than Class Members 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASE

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 3, 5

RULE

Fed. R. Civ. P. 23 Advisory Committee's Notes 7

TREATISES

Anthony Rollo & Gabriel A. Crowson, *Mapping The New Class Action Frontier – A Primer on The Class Action Fairness Act and Amended Rule 23*, 59 Consumer Fin. L.Q. Rep. 11 (2005) 7
Brian Wolfman & Alan B. Morrison, *What the* Shutts *Opt-Out Right Is and What it Ought to Be*, 74 UMKC L. Rev. 729 (2006) 7
Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, Antitrust, Fall 2005 8
Corinne Bergen, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat*, 5 J. Int'l Bus. & Law 203 (2006) 6
David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831 (2002) 5
Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 9
George Cohen & Susan Koniak, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129 (2001) 8
Jay W. Eisenhofer, *Institutional Investors as Trend-Setters in Post-PSLRA Securities Litigation*, 744 PLI/Lit 579 (2006) 11
John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000) 5

John C. Coffee, Jr., *Class War The Dilemma of the Mass Tort Action*, 95 Colum. L. Rev. 1343 (1995) 4
John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851 (1995) 6
John E. Kennedy, *Class Actions: The Right to Opt-Out*, 25 Ariz. L. Rev. 3 (1983) 5
Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85 (1997) 5
Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103 (2006) 1
Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 Ariz. L. Rev. 461 (1997) 4
Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148 (1998) 4
Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. Chi. Legal F. 475 (2003) 4
Samuel Isaacharoff, *Preclusion, Due Process and the Right to Opt Out*, 77 Notre Dame L. Rev. 1057 (2002) 3
Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337 5
Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529 (2004) 3
Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts 9

QUESTION PRESENTED

Whether the ability of class members painlessly to opt out of a class action or a proposed settlement implicates deterrence-based concerns such that courts should analyze procedural burdens associated with opting out – such as the excusable neglect standard involved in this case – to maximize the exit capabilities of those who wish to commence independent litigation.

INTERESTS OF *AMICI CURIAE*[1]

Myriam Gilles is a professor of law at the Benjamin N. Cardozo School of Law. She has written numerous articles in the areas of civil rights and class actions, and has recently co-written an article asserting that small-claims class actions are best justified as a deterrent measure, rather than as a mechanism for compensating victims of widespread but low-value wrongdoing.[2] From this deterrence-based perspective, courts assessing the efficacy or desirability of class action practices should focus solely on forcing wrongdoers to internalize the social costs of undesirable behavior.

Guy-Uriel Charles is the Russell M. and Elizabeth M. Bennett Professor of Law at the University of Minnesota. He teaches and writes in constitutional law, civil procedure, and election law.

SUMMARY OF ARGUMENT

This case concerns an effort by various insurance companies to opt out of a class action settlement struck by class counsel with defendant pharmaceutical companies for violations of

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[1] This brief of *amici curiae* was written by Professors Myriam Gilles and Guy Charles. In accordance with Rule 37.6, the Professors state that this brief was not authored in whole or in part by counsel for any party. The printing, binding and filing of this brief was paid for by healthcare providers not party to this appeal: BlueCross BlueShield of Massachusetts, Blue Cross and Blue Shield of Nebraska, Excellus Health Plan, Inc., The Guardian Life Insurance Company of America, and Horizon Blue Cross Blue Shield of New Jersey.

[2] Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103 (2006).

the antitrust laws. The petitioners mailed their opt-out notices before the deadline, but the U.S. mail did not deliver the notices until after the opt-out period had ended. Therefore, the narrow issue before this Court is whether a per se rule on excusable neglect should be applied to foreclose such opt-outs.

But the resolution of this narrow, somewhat technical issue has broad policy consequences quite separate from the doctrinal and constitutional effects described in the main petition. In addition to serving the interests of due process and litigant autonomy, the right to opt out of class actions and class settlements serves the critical objective of deterrence. Contemporary class action practice is best justified on a deterrence-centric model of maximizing the social costs the wrongdoer is forced to internalize. In light of this primary objective, procedural hurdles placed in the way of opt-outs are counterproductive, as opt-outs seeking to commence litigation independent from the class can serve as an additional, and potentially powerful, deterrent force within the class action system.

ARGUMENT

A. TRADITIONAL JUSTIFICATIONS UNDERLYING THE OPT-OUT RIGHT

Opt-out rights play a central role in class action litigation – both in the theoretical underpinnings that legitimize class actions and in the practical, day-to-day operation of class action litigation. As petitioners argue in their main brief, the

right to opt out has significant constitutional dimensions.[3] Federal Rule of Civil Procedure 23(c)(2)(A) requires that class members be given the opportunity to exclude themselves from a (b)(3) case. This right "provides a key premise for many of the basic principles that shape the (b)(3) action – jurisdiction over absent parties, due process considerations, judicial review of settlements, awards of attorneys fees, and much more."[4] The right to opt out of the class is therefore central to "the argument for why (b)(3) class actions satisfy procedural due process requirements, even though absent class members are represented by attorneys they did not select and may have never met."[5] As this Court suggested in *Phillips Petroleum Co. v. Shutts*,[6] a class member only submits to the jurisdiction of the court after receiving notice of the action and failing to opt out.

In addition, opt-out rights are central to due process concerns associated with the binding nature of class action settlements. In the words of Professor Isaacharoff, "a due process right to opt out is a prerequisite for a binding judgment."[7] Once that prerequisite has been fulfilled, "the courts will bind class members to the judgment if they fail to exercise their privilege to exclude themselves from the class..." and courts will enjoin or refuse to permit class members who failed to

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3 Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529 (2004).

4 *Id.*

5 Eisenberg & Miller, *supra* note 3, at 1534.

6 472 U.S. 797 (1985).

7 Samuel Isaacharoff, *Preclusion, Due Process and the Right to Opt Out*, 77 Notre Dame L. Rev. 1057 (2002).

opt out to re-litigate matters decided in the class action by way of judgment or settlement.[8]

Finally, opt-outs serve important non-constitutional goals. For example, opt-outs may function as a signal to the judge on the fairness of the overall class settlement[9] the opportunity to opt out allows high-value claimants (particularly in the mass tort context) the chance to maximize individual recovery[10]; and, more generally, the right to opt out provides litigants their "day in court,"[11] thereby fostering the sense of

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8 Eisenberg & Miller, *supra* note 3, at 1535.

9 John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Action*, 95 Colum. L. Rev. 1343, 1382 (1995) (noting that the "existence of substantial opt-outs may be the best evidence that the original settlement was inadequate (and possibly collusive)").

10 In the mass tort context, individual claimants may have high-value damages that they wish to pursue in independent tort actions. *See, e.g.*, Coffee, Jr., *supra* note 9, at 1447 (stressing the importance of allowing opt-outs in the mass tort context).

11 *See, e.g.*, Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1174 (1998) ("[r]ecognition of a substantive due process right to opt out of at least some damages claims has considerable plausibility. It would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation and autonomy."); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 Ariz. L. Rev. 461, 472 (1997) (arguing that the opt-out right is central to "the right to assert one's own rights"); Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. Chi. Legal F. 475, 510 (2003) (asserting that "all options have some positive view, and the control of one's own litigation cannot be

fairness and autonomy that is critical to the legitimacy of the civil justice system.

For all these well-rehearsed reasons, much discussed by scholars in this area,[12] opt-outs should be accorded every reasonable accommodation and benefit of the doubt. Any procedural or practical burdens placed in the way of opt-outs should be reduced or eliminated, so as to make opting out of a class action or settlement as easy as possible.

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regarded as a small detail within the overall scheme of civil procedure").

12 *See, e.g.*, John E. Kennedy, *Class Actions: The Right to Opt-Out*, 25 Ariz. L. Rev. 3 (1983); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum v. Shutts, 96 Yale L.J. 1 (1986); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions,* 1999 Sup. Ct. Rev. 337; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000). Indeed, even the handful of scholars who critique opt-outs do so for utilitarian reasons, and as such, recognize their importance to the system of class litigation. *See, e.g.*, Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 136 (1997) (arguing that opt-outs can disrupt settlements that are desirable to the majority of class members); David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831 (2002) (advocating mass-tort class actions with no opt-out rights). As others have therefore noted, "those commentators who criticize opt-out rights…generally agree about the importance of the procedure – otherwise they would not be so critical." Eisenberg & Miller, *supra* note 3, at 1540.

1. Deterrence-Based Rationale for Maximizing Opt-Out Rights

In addition to these traditional justifications for the opt-out provisions of Rule 23, this Court should also consider the importance of deterrence. Congress, by including within the Clayton Act a private right of action, sought to maximize the detection and prosecution of antitrust violations, and thereby to maximize the deterrent potential of private antitrust litigation, including but not limited to class action litigation.[13] Any impediments to the right to opt out – such as the mailing requirement at issue here, or the failure to apply a rule of excusable neglect – hamper these fundamental goals.

2. Collusive Settlements

In many cases, both class counsel and defendants' attorneys have obvious incentives to erect artificial impediments to opting out.[14] After all, opt-outs serve as a check on class

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[13] *See, e.g.*, Corinne Bergen, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat*, 5 J. Int'l Bus. & Law 203 (2006) ("With 90% of its antitrust law enforcement generated by private rights of action, the United States provides a great opportunity for aggrieved consumers to right the wrongs that have been done to them, while concurrently, maximizing its avenues of antitrust enforcement. Consumers assist the Department of Justice (DOJ) and the Federal Trade Commission (FTC) with the enforcement of the U.S. antitrust law by asserting the right granted to them under the Clayton Act to bring private actions.").

[14] *See, e.g.*, John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851 (1995) (criticizing contemporary class action practices where, among other things, the value of the class action is reduced by the burdening of opt-out choices presented to class members).

counsel,[15] reduce the size of the class and thereby weaken class counsel's leverage in settlement, and decrease class counsel's potential compensation.[16] Defendants also benefit from low opt-out rates, as they can achieve a more comprehensive and likely cheaper settlement with one set of lawyers than with many.[17] As Professors Cohen and Koniak remind us, class counsel and defendants will engage in much creative lawyering to reduce the total number of opt-outs:

> One strategy is to make the class as big and undivided as possible, which means bigger fees for class counsel, greater finality for defendants, and fewer competing plaintiffs'

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15 Coffee, *Class Wars*, at 1450 ("The modern value of the right to opt out may lie more in its utility as a checking mechanism than its ability to protect litigant autonomy.").

16 Concerns about class counsels' incentive to minimize the number of opt-outs was likely one of the factors considered by the Advisory Committee in drafting new Rule 23(e)(2), which requires parties seeking approval of a class action settlement to "file a statement identifying any agreement made in connection with the proposed settlement," including agreements setting out the number of opt-outs needed to trigger a "blow provision" or defendant's right to walk away from the deal. Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments. *See also* Anthony Rollo & Gabriel A. Crowson, *Mapping The New Class Action Frontier – A Primer on The Class Action Fairness Act and Amended Rule 23*, 59 Consumer Fin. L.Q. Rep. 11 (2005) (noting that the amended rule "may help limit some possible existing potential abuses or improper collusion").

17 *See, e.g.*, Brian Wolfman & Alan B. Morrison, *What the* Shutts *Opt-Out Right Is and What it Ought to Be*, 74 UMKC L. Rev. 729, 731 (2006) (noting that "in many of these cases, the defendant would prefer that the class action be 'mandatory,' or non-opt-out, to maximize the settlement's res judicata effect").

> lawyers to muck things up . . . . Another strategy is to find methods to lock class members into settlements, thereby defeating the ordinary right of absent class members to 'opt out.' Transforming opt-out classes into non-opt-out classes is another way of ensuring as much finality as possible for defendants.[18]

The lawyers' allied incentives are clear, as is the extent to which such actions undercut the deterrent power of the antitrust laws and other federal statutes.[19] For this reason, the appropriate test for determining the validity of the opt-out should be far more exacting than the deferential standards under which the circuit court affirmed the district court's approval of the settlement, containing within it the mailing rule at issue here. Courts should be particularly vigilant against any measure that impedes the ability of class members to opt out.

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[18] George Cohen & Susan Koniak, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129, 147 (2001).

[19] This is especially true given than most antitrust class action settle. *See, e.g.*, Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, Antitrust, Fall 2005, at 26 (discussing a study of individual and class action antitrust cases finding that 71% to 88% settle before trial). Settlement means that the defendant is paying less than the full value of the social loss created by its actions. Gilles & Friedman, *supra* note 2, at 151 ("Indeed, the only time a defendant is forced to internalize costs that exceed the social costs of its actions is, we suspect, when a case goes to judgment, and punitive or tremble damages are imposed."). Where there exist opt-outs pursuing separate claims, the potential for full internalization comes closer to being realized.

3. Infrequency of Opt-Outs

A related rationale for a rule of lenity in the review of efforts to opt out is that very few class members make such an effort.[20] In an empirical study of opt-out rights undertaken by Professors Theodore Eisenberg and Geoffrey Miller, examining "several thousand class action decisions for the eleven-year period between 1993 and 2003," and generating "159 cases with qualitative information about the number of opt outs," the authors concluded that opt-outs are rare: fewer than 1% of all class members exercise their right to opt out of the class or proposed settlement.[21] Other studies have also revealed low opt-out rates.[22]

Further, the rate at which opt-outs actually commence separate litigation is likely even lower. This "is all the more

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20 As Debbie Hensler notes:

> If the loss is large and apparent to the individual consumer or business, that party may seek legal advice and, eventually, bring an individual lawsuit. But if the loss is small, it is less likely to be recognized by those affected, and it is less likely that anyone will come forward to claim compensation even if many individuals or businesses are affected by it.

21 Eisenberg & Miller, *supra* note 3, at 1532:

22 Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) ("Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class; 75% of the opt-out cases had 1.2% or fewer of class members opt out."). *See also* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) (finding low opt-out rates in an examination of four class action cases).

significant since class members and class counsel effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel, are relieved of litigating often difficult class certification issues, and only have to prove their own damages."[23]

So where opt-outs do come forward seeking to commence separate litigation—whether because the opt-outs have different claims from the rest of the class, or wish to seek different types of relief, or simply hope to maximize their recovery—this can only improve the deterrent function of class action practice by maximizing the social costs that the wrongdoer must internalize. It is important to note, in this regard, that the claims of opt-outs are not simple "facsimiles of the class action claims": particularly relevant here are the "differences in liability attached to state court claims, speed at which state courts can ferry cases through the litigation pipelines and discovery advantages, augment the settlement value of opt-outs."[24]

4. Evidence that Opt-Outs Do Better than Class Members

The argument that encouraging opt-outs will maximize the deterrent value of class action litigation is based on the assumption that opt-outs will do well—perhaps even better—than class members. Much of the evidence that underlies this assumption is impressionistic and anecdotal. So, for example, Professors Eisenberg & Miller found that opt-out rates vary depending on the type of case, so that mass tort and

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23 Gilles & Friedman, *supra* note 2, at 130.

24 Eisenhofer at 591.

employment discrimination cases experience a higher rate of opt-outs. The authors assert that this is likely due to the fact that tort and employment claims tend to be high-value individual claims, where the claimant may have greater success at maximizing recovery by "going it alone," even through to trial.[25]

Recent commentary also indicates that institutional investors are increasingly choosing to opt out of securities class action settlements.[26] Specifically, "investors with large losses have sought to maximize their recoveries by opting out of the class action and pursuing independent claims." In the WorldCom litigation, for example, "close to 80 institutional investors opted out of the class litigation...[and] were tremendously successful and generated substantial premiums for the opt-out plaintiffs over the historic recovery achieved by the class litigation."[27] And this choice appears to be economically rational: "where institutional investors have publicly revealed the settlement outcomes of these opt-out suits, their recoveries appear to have exceeded that of the class plaintiffs."[28] Indeed, since the success of the WorldCom opt-outs, this strategy has "become increasingly popular among

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25 *Id.*

26 *See* Jay W. Eisenhofer, *Institutional Investors as Trend-Setters in Post-PSLRA Securities Litigation*, 744 PLI/Lit 579 (2006).

27 *Id.* at 590 ("For example, the Ohio Retirement Systems with total losses from stock and bond purchases of $500 million, garnered a $94 million settlement. The Alabama Retirement Systems, which sued a collection of WorldCom underwriters for its purchases of WorldCom bonds, recovered over $111 million, representing 86% of bond losses.").

28 *Id.*

institutional investors in cases of egregious fraud where investors have suffered large losses."[29]

Commentators assert that "the primary reason to opt out of securities class actions is the opportunity to obtain a larger and quicker recovery...[and that] it is clear from recent successes that institutional investors are able to command a premium over class settlements by opting out."[30]

CONCLUSION

There is no doubt that the right to opt-out triggers important concerns relating to constitutional due process and litigant autonomy, among others. However, in the real-world of contemporary class action litigation, opt-outs serve far more practical functions: they serve as a check on class counsel, as a thorn in the defendants' side, as notice to the judge about the adequacy of the settlement, and, as we have argued here, as an additional deterrent force. Because none of the main characters in the class action drama wish to share the spotlight with potential opt-outs, significant efforts are made to reduce the opportunity or ease of opting out of a settlement. As commentators note, "the present-day battle over opt-out rights involves settling defendants and plaintiffs' counsel seeking

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29 *Id.* at 590 ("In the Bristol Meyers securities litigation, five pension funds who opted out of the securities class action settled their claims with Bristol Meyers for $89 million. This was ten times the recovery they would have received had they participated in the class action...Recently, in the AOL-Time Warner securities litigation, Lerach Coughlin announced that it had amassed a collection of 100 institutional investors with collective losses of $1.5 billion to opt-out of the $2.6 billion class action settlement.").

30 *Id.*

mandatory certification on the one hand, and putative opt-out absentee-objectors challenging the settling parties' cram down efforts on the other."[31] In determining the victor in that battle, courts should consider the deterrent value that opt-outs bring, particularly in cases such as this where the opt-outs have filed separate litigation, do not effect the class settlement or "blow provision," and seek to press different legal theories. Upholding the procedural obstacles put in the way of opt-outs by those crafting the class settlement is, quite simply, a bad policy choice.

Respectfully submitted,

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[31] Wolfman & Morrison, *supra* note 17, at 732.